



* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Reserved on: 18.02.2014
Pronounced on: 14.03.2014

+ **ITA 55/2014, C.M. APPL. 2383/2014 & 2384/2014**

SH. GULSHAN MALIKAppellant
Through: Sh. Prakash Kumar and Sh. Sheel
Vardhan, Advocates.
Versus

COMMISSIONER OF INCOME TAXRespondents
Through: Sh. Rohit Madan, Sr. Standing Counsel.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE R.V. EASWAR

MR. JUSTICE S. RAVINDRA BHAT

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1. This is an appeal filed against the order of the Income Tax Appellant Tribunal ("ITAT") in ITA No. 161/Del/2012 dated 27.02.2013, which upholds the order of the Commissioner of Income Tax (Appeals) ("CIT-A") confirming the assessment order of the Assessing Officer ("AO"). The short question of law that arises is whether on facts, capital gains are taxable as long-term or short-term capital gains. The brief facts are as follows:

2. The appellant (the assessee) and his wife had booked an apartment vide an application dated 31.07.2004, by payment of a booking amount of ₹ 2,00,000/- on 3.08.2004 and consequently, it is claimed, acquired rights or interests in the same. The builder DLF Universal Limited ("DLF") issued a letter dated 6.08.2004



provisionally allotting the apartment and two parking spaces, stating specifically the receipt of ₹ 2,00,000/- (Annexure 3). Consequent to this, regular payments were made per the payment plan of the builder. A buyer's agreement was executed on 4.11.2004 between DLF and the allottees i.e. the appellant and his wife. Per the payment schedule, a total payment of ₹ 87,12,500/- was made from 31.07.2004 to 03.08.2006 towards the purchase of the apartment. Following this, the appellant and his wife entered into an agreement to sell dated 2.11.2007 to sell their booking rights/rights or interest in the apartment to Smt. Srilekha Nayak for a sum of ₹ 1,44,87,500/-. The period between acquisition and sale of the booking rights in the apartment is claimed to be 39 months and 2 days, thus greater than 36 months, i.e. from 31.07.2004 to 02.11.2007. The appellant subsequently filed return of income on 31.3.2009 for the assessment year 2008-2009, with income declared to be ₹ 3,84,874/-. In the computation of income, the appellant had declared a long term capital gain of ₹ 31,35,740/- on the sale of booking rights/extinguishment of rights in the apartment. An exemption was claimed under Section 54 of the Act, 1961 as the same was invested in purchase of another apartment in June 2008.

3. After the return was processed under Section 143(1) of the Act and the case was thereafter selected for compulsory scrutiny, an order of assessment was passed under Section 143(3) of the Act on 30.12.2010 whereby an addition of ₹ 28,20,000/- was made by the



Assessing Officer (AO) to the income declared by the appellant on account of short-term capital gain. No deduction under Section 54 was allowed since it is available only in respect of long-term capital gains. The total income was thus assessed to be ₹ 32,10,145/-. The appeal against the order of the AO before CIT-A was dismissed by an order dated 25.11.2011, on the grounds that the rights in the apartment accrued to the appellant only when the apartment was purchased by the agreement dated 4.11.2004. It was also noted that only rights in the property and not title were transferred vide the agreement of 2.11.2007 as the assessee never had possession of the apartment. The assessee's second appeal before the ITAT was also dismissed vide order dated 27.02.2013 on the ground that no rights in the property accrued to the appellant/allottees on the date of filing of the application for allotment i.e. 31.7.2004, as notes 1 and 2 enclosed with the confirmation letter dated 06.08.2004 received in response to the allotment application states clearly that no rights to the property would accrue to the allottees until the buyer's agreement was signed and returned; the buyer's agreement was executed only on 4.11.2004. Consequently, the ITAT found that the capital asset was sold within a period of 36 months thus rendering the profits from the sale taxable as short-term capital gains, which do not qualify for the deduction under Section 54.

4. The question that arises for consideration is whether any right accrued to the assessee by way of the application for allotment that



can be considered a capital asset; this would determine whether the date of application for allotment of the apartment or the date of the buyer's agreement ought to be considered the date of acquisition of the capital asset that was sold on 2.11.2007 as well as whether the capital gain is taxable as long-term or short-term capital gains.

5. The appellants submit that by way of application dated 31.7.2004 for allotment and payment of the booking amount, the appellant had acquired the "right to purchase the property"/booking rights, which were extinguished by execution of the agreement to sell dated 2.11.2007 in favour of Smt. Srilekha Nayak, thus making his booking rights a long-term capital asset, held for a period of 39 months and 2 days. Alternatively, the appellant submits placing reliance on *Commissioner of Income Tax v. Ved Parkash and Sons (HUF)*, [1994] 207 ITR 148 that rights in the apartment were acquired on the date of receipt of allotment letter i.e. 6.8.2004, by which the apartment was provisionally allotted to him, which rights were sold on 2.11.2007 thus making his right in the apartment a long-term capital asset. The two grounds for this submission are *first*, that Section 2(47) of the Act, which defines "transfer" in relation to a capital asset, is a wide and inclusive definition that encompasses even transfer of a right in property, thus including within its ambit, transfer of booking rights, *second*, that a combined reading of Sections 2(14) and 2(47) of the Act show that transfer of a capital asset is not restricted to transfer of ownership in immovable property



alone. The learned counsel for the Revenue, on the other hand, relies on the order of the learned ITAT member who held that booking rights accrued in the assessee only once the buyer's agreement of 4.11.2004 was signed, thus making the profits from sale taxable as short-term capital gains.

6. It would be appropriate to extract Section 2(14), 2(42A), 2(47) here in relevant part. Section 2 of the Act reads:

"2. In this Act, unless the context otherwise requires, –

(14) "capital asset" means property of any kind held by an assessee, whether or not connected with his business or profession, but does not include –

xxx

(42A) "short-term capital asset" means a capital asset held by an assessee for not more than thirty-six months immediately preceding the date of its transfer:

xxx

(47) "transfer", in relation to a capital asset, includes, -

(i) the sale, exchange or relinquishment of the asset ; or

(ii) the extinguishment of any rights therein ; or

(iii) the compulsory acquisition thereof under any law ; or

(iv) in a case where the asset is converted by the owner thereof into, or is treated by him as, stock-in-trade of a business carried on by him, such conversion or treatment ; or

*(iva) the maturity or redemption of a zero coupon bond ;
or*



(v) any transaction involving the allowing of the possession of any immovable property to be taken or retained in part performance of a contract of the nature referred to in section 53A of the Transfer of Property Act, 1882 (4 of 1882) ; or

(vi) any transaction (whether by way of becoming a member of, or acquiring shares in, a co-operative society, company or other association of persons or by way of any agreement or any arrangement or in any other manner whatsoever) which has the effect of transferring, or enabling the enjoyment of, any immovable property.

Explanation 1.-- xxx

Explanation 2.--For the removal of doubts, it is hereby clarified that "transfer" includes and shall be deemed to have always included disposing of or parting with an asset or any interest therein, or creating any interest in any asset in any manner whatsoever, directly or indirectly, absolutely or conditionally, voluntarily or involuntarily, by way of an agreement (whether entered into in India or outside India) or otherwise, notwithstanding that such transfer of rights has been characterised as being effected or dependent upon or flowing from the transfer of a share or shares of a company registered or incorporated outside India...."

7. It is clear that a "capital asset" under the Act is property of "any kind" that is "held" by the assessee. Necessarily, a capital asset must be transferable. Thus, to understand what kind of property can be considered a capital asset, it would be apposite to refer to the definition of transfer in Section 2(47) of the Act. Section 2(47)(v) and (vi), and Explanation 2 make it adequately clear that possession, enjoyment of immovable property, as well as an interest in any asset



are all transferable “capital assets”. The reference to acquisition “*by way of any agreement or any arrangement or in any other manner whatsoever*” establishes that it is not conveyance of property or the doctrine of part performance (enacted through Section 53A of the Transfer of Property Act) which result in enforceable rights, for the purposes of the Income Tax. The scheme of the Act puts it beyond doubt that even rights or interests in a property are kinds of property that are transferable capital assets. Thus, there is no doubt that booking rights or rights to purchase the apartment or rights to obtain title to the apartment are also capital assets that can be transferable. However, even while this Court agrees with the submissions of the appellant, it is pertinent to note that this question does not arise in these facts. Neither the CIT-A nor the ITAT have held that a capital asset can only be title to/ownership of the apartment. The order of the CIT-A locates the source of the booking rights i.e. date of acquisition of capital asset as the buyer’s agreement dated 4.11.2004, which finding is subsequently confirmed by the ITAT by additionally relying on the receipts at the time of confirmation of allotment. Thus, in these facts, the question of whether the booking rights are a transferable capital asset is not contentious. The judgment in *Ved Parkash* (supra) is also consequently of no assistance in this matter since the reasoning therein turns on whether “capital asset” refers only to title to property as opposed to other rights/interests in the property.



8. This being the case, the only question that arises for consideration is whether the booking rights to the apartment accrued to the assessee on the date of application for allotment/confirmation of allotment or on the date of execution of the agreement to sell i.e. the buyer's agreement. This Court is of the opinion that a right or interest in an immovable property can accrue only by way of an agreement embodying *consensus ad idem*. The nature of the right sought to be transferred here is the right to purchase the apartment and obtain title, termed "booking rights". Only that agreement which intends to convey these rights according to both parties can be considered as the source of accrual of rights to the assessee. The confirmation letter dated 6.8.2004 (Annexure 3) specifically states *first*, that no right to provisional/final allotment accrues until the Buyer's Agreement is signed and returned to the builders and *second*, that no right to claim title/ownership results from the confirmation letter itself. Thus, it is clear that the Builders do not intend to convey any right of provisional/final allotment or any right to claim title/ownership under the confirmation letter. There being no intention to convey rights in this document, it would be impermissible for this Court to find that the right to obtain title/"booking rights" emanated from the confirmation letter. These rights may only be located in the Buyer's agreement, and thus, the date of acquisition of the capital asset must be considered the date of signing of said agreement i.e. 4.11.2004



9. These rights were transferred by the assessee on 2.11.2007. Thus, this Court is of the opinion that the capital asset in the form of these rights was held for a period of 35 months and 28 days, i.e. a short-term capital asset thus rendering the profits from the transfer of this capital asset taxable as short-term capital gains.

10. *Ved Parkash (supra)*, in any event, can be distinguished from the facts in this case. In *Ved Parkash (supra)*, the assessee sought to claim that the date of acquisition of the capital asset was the date of entering into the agreement to sell with the builder, by which the assessee had also received possession of the property. The Department, on the other hand, claimed that according to the conditions of the agreement, no right, title or interest in the property would be conveyed to the assessee until all instalments due and payable under that agreement were completed. It was also sought to be argued that the assessee became the titleholder to the property only once all the instalments were paid, and that title to the property was the only capital asset that could be transferred. It was in the context of these arguments that the Court held *first*, that it is incorrect to say that the assessee had no right or interest in the property until the completion of payment of all instalments under the agreement as the assessee was a beneficial owner from the date of signing the agreement, having been put in possession of the property as of that date and *second*, that Section 2(42A) of the Act, in any event only uses the term “held” and not “owned”, thus indicating



that a capital asset need not only refer to full title over any property. *Ved Parkash (supra)* can thus be distinguished on two grounds, *first*, that in the instant matter, booking rights are sought to be sourced in the allotment application/confirmation letter and not in an agreement to sell, *second*, no right of possession or similar beneficial interest was conveyed to the assessee in the instant case when the application for allotment was made/confirmation letter was received. The agreement to sell was considered to be the source of a beneficial interest to the assessee in *Ved Parkash (supra)* only because the right of possession had been transferred to the assessee along with the agreement to sell. There cannot be any parity between the allotment application/confirmation letter in the instant case and the agreement to sell in *Ved Parkash (supra)*, since the confirmation letter specifically states that no right of provisional allotment/final allotment will result from it to the assessee.

11. This Court is thus of the opinion that there is no legal infirmity in the order of the ITAT. The appeal is thus dismissed along with pending applications.

S. RAVINDRA BHAT
(JUDGE)

R.V. EASWAR
(JUDGE)

MARCH 14, 2014